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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 570

THE GEORGIA RAILWAY AND ELECTRIC COMPANY, GEORGIA RAILWAY AND POWER COMPANY, and GEORGIA POWER COMPANY

APPELLANTS

vs.

CITY OF DECATUR

APPELLEE

REPLY BRIEF OF APPELLEE

The Provisions of the Georgia Constitution, Referred to in Appellants' Brief, Are Not Applicable.

Appellants in a reply brief contend that the reserved power of the State of Georgia to alter, amend or repeal corporate charters has no applicability to this case for the reason that the Supreme Court of Georgia in deciding the case did not refer to this reserved power, and for the further reason, as contended, that the acts in question (the charter of the City of Decatur as amended by Georgia laws 1919, page 934 et seq., and Georgia laws 1924, page 534 et seq.) were not in terms enacted as amendments to the charters of appellants. In an effort to support this contention, they quote a part of the provision of the Constitution of the State of Georgia (Article I, section 4, paragraph 1) to the effect that

> "No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby . . . ."

They argue:

> "The charters of appellants could not be changed, modified or affected by the special local acts in question."

The provision of the constitution of Georgia from which they quote is set out in full as follows:

> "Laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an existing general law. No general law affecting private rights shall be varied in any particular case by special legislation, except with the free consent, in writing, of all persons to be affected thereby; and no person under legal disability to contract is capable of such consent."
>
> *Georgia code, 1926, section 6391.*

It is respectfully submitted that this provision of the constitution of Georgia is in no wise applicable to the case. There was no existing general law governing the subject-matter; that is, the matter of providing for improving and paving streets and assessing the cost thereof; and, therefore, the provision in the above quoted section of the Constitution of Georgia is not applicable. The Supreme Court of Georgia in *Weed v. Mayor and Aldermen of Savannah, 87 Ga. 513,* in dealing with a special act empowering the Mayor and Aldermen of Savannah to improve the streets and levy local assessments therefor, held that this provision of the constitution of Georgia was not applicable to such a special law. In that case, the court said:

> "No provision has ever been made by any general statute of this State as to how municipalities shall cause or require the paving of streets to be done, or other local improvements to be made therein, nor for collecting the cost thereof. An act, therefore, which empowers a particular city to make such improvements, or require the same to be made, and to collect a portion of the cost thereof by assessment upon

> the property abutting on such streets, is not a special law infringing that clause of the constitution first above quoted. This proposition, to our minds, is so clear and plain that simply stating it is sufficient, without argument. Again, there is no general statute of which we are aware exempting the citizens of the cities and towns in this State from the imposition of assessments for improving public streets on which their property abuts; hence, there are no 'private rights' in the nature of such exemption which would be varied by the passage of an act authorizing a particular city to make such improvements in its streets, and to levy assessments therefor. It seems equally clear, therefore, that the acts above mentioned do not vary any 'general law affecting private rights,' and we make the same remark with reference to the second clause of the constitution above quoted as we did concerning the first." (page 514).

As to the contention or intimation of appellants that the charter provisions of the City of Decatur and the amendatory acts may have been passed in violation of the provision of the Constitution of the State of Georgia, Article 3, section 7, paragraph 8 (Georgia code section 6437), which provides that:

> "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof."

and the provision in Article 3, section 7, paragraph 17 (Georgia code section 6445), that:

> "The amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alternation to be made,".

we respectfully submit that this question is one for the state court, certainly in the first instance, to pass upon, and the contention has not heretofore been raised or suggested in this case. If it had been, it would unquestionably have been rejected by the Supreme Court of Georgia because the titles of

the acts in question are amply broad to meet the constitutional requirement above referred to. We do not understand that this Court will inquire into the question of whether a state law conflicts with a provision of the state constitution, especially where such question was not raised for decision in the state courts.

Appellants' Franchise Was Expressly Subject to All Assessments and Other Lawful Burdens Imposed from Time to Time.

The franchise under which appellants operate their street railway lines in the City of Decatur was granted by the city and accepted by the appellants, expressly subject to the provision that appellants shall

> "be subject to all just and reasonable rules and regulations of the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

The Constitution of the State of Georgia, Article 3, section 7, paragraph 20 (Georgia code, section 6448) provides:

> "The General Assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Georgia laws, 1894, page 69 et seq. (Georgia Code, section 2600), contained the provision that

> "no street-railroad incorporated under this division shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities: And provided further, that all such street-railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time." (See appendix, page 13 of brief of appellee).

The Georgia Railway & Electric Company was incorporated in 1902. Georgia Railway & Power Company was incorporated in 1911; and the present Georgia Power Company was incorporated in 1930 (R. 124). Therefore, the provisions of the Constitution of Georgia and of Georgia laws 1894, above quoted, are applicable. The Supreme Court of Georgia in *Savannah Railway Company v. Mayor & Aldermen of Savannah, 112 Ga. 164, 167,* in holding that the City of Savannah, Georgia, had the power to levy and collect an occupation or business tax from street railroad companies for the use and occupancy of the city streets by their tracks and cars, based its decision upon the above quoted provision of Georgia laws, contained in Georgia laws of 1894, saying:

> "Admitting for the sake of the argument the soundness of the plaintiff's contention as to the force and effect of the Augusta case, 78 Ga. 119, we would still hold that under the act of 1894 (now section 2180 of the Civil Code) the city authorities had power to levy an occupation or privilege tax upon this plaintiff in error. The record discloses that the company was incorporated under the act just cited. In the act and in the code section is a proviso which declares that all street-railroad companies incorporated thereunder 'shall be subject to all just and reasonable rules and regulations by the corporate authorities and liable for all assessments and other lawful burdens that may be imposed upon them from time to time.' As before remarked, the charter of the city gives it ample power to levy and collect a tax upon the business of street-railroad companies. The tax is therefore within the terms 'assessments and other lawful burdens' imposed upon them."

The provisions of Georgia laws 1894, above referred to, in effect became a part of appellants' franchise.

Sioux City Street Railway Company v. Sioux City, 138 U. S. 98;

Atlantic & Gulf Railroad Company v. State of Georgia, 98 U. S. 359.

The Decision in United Railways & Electric Company v. Mayor & City Council of Baltimore, 122 Md. 660, 96 Atl. 880, Upon Which Appellants Rely, Is Not Applicable on the Questions Now Before the Court.

The decision in that case was expressly based upon the state constitution, the Court of Appeals of Maryland holding that the special assessment there involved was illegal and void because contrary to provisions of the Constitution of the State of Maryland. In deciding the case, the Maryland court expressly refrained from basing its decision upon any provision of the Federal Constitution, saying:

> "In the briefs of the parties, the federal question is exhaustively and ably discussed, and many decisions from the Supreme Court of the United States and elsewhere are cited in support of the conflicting contentions. After the most careful consideration of the case, we do not find it necessary to pass upon the federal question suggested in the briefs, but we rest the decisions solely upon the Constitution and decisions of our court."

The Offer to Surrender the Street Railway Franchise

The Supreme Court of Georgia held that the offer of appellants to split or separate their street railway franchise and property from their electric light and power business and property, and to surrender one branch of their service, the street railway branch, which they contended was unprofitable on account of the five-cent rate contract made with the City, in settlement of the assessment, and at the same time hold to the other branch of the service, their electric light and power franchise and property thereunder, that may be profitable, was not an offer which the City was bound to accept, and did not relieve appellants from their obligation to pay the assessment. This ruling of the state court is supported by the decision of this Court in **Broad River Power Company v. State of South Carolina, 281 U. S. 537 (5)**, where it was held:

"Refusal to permit abandonment of a part of a public utility franchise does not take property without due process of law, although such portion of the franchise has become unprofitable."

We respectfully submit that this is especially true in the present case in view of the fact that the rate which appellants complain of was fixed by contract which they entered into voluntarily and under which they reaped benefits. This contract has been upheld in a number of cases decided by the Supreme Court of Georgia and twice by this Court, as pointed out on page 11 of the original brief of appellee.

Respectfully submitted,

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